IN THE HIGH COURT OF PUNAJB AND HARYANA AT CHANDIGARH

Date of Decision: December 21, 2007

Pritpal Singh, Retired Judge (since deceased) through his Legal Representatives ..... Petitioner

versus

Union of India and another ..... Respondents

CORAM

HON'BLE MR.JUSTICE HEMANT GUPTA.
HON'BLE MR.JUSTICE MOHINDER PAL

1.Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3.Whether the judgment should be reported in the Digest ?

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Present: Shri Rajiv Atma Ram, Senior Advocate with
Shri Hem Raj Mittal, Advocate for the petitioner

Shri Gurpreet Singh, Advocate for the respondents

HEMANT GUPTA, J.

The petitioner is a former Judge of this Court, now represented by his wife and daughter. The challenge in the present writ petition is to declare the proviso to Para 2 (b) of Part III of the First Schedule of the High Court Judges (Conditions of Service Act), 1954 (hereinafter to be referred as "the Act") which fixes the maximum limit of pension of a retired Judge of a High Court, as ultra vires Articles 14 and 16 of the Constitution of India being arbitrary and discriminatory.

The petitioner joined Punjab Civil Services (Judicial) on 25.4.1951. He was promoted as Additional District Judge on 12.11.1969

and elevated as a Judge of this Court on 2.2.1983. The petitioner attained the age of superannuation on 15.10.1987.

The case of the petitioner is that Para 2 (b) of Part III of First Schedule of the Act provides for special additional pension of Rs.1600/- per annum in respect of each completed year of service for pension but maximum limit is Rs.8000/- per annum. Apart from the said limit, by virtue of proviso, the maximum limit of pension and additional pension is Rs.48,000/- per annum. The challenge by the petitioner is to both the maximum limits fixed under the aforesaid provisions.

Section 15 of the Act deals with pension payable to a Judge who is not a member of the Indian Civil Service but has held any other pensionable post under the Union or a State. Such pension is payable in accordance with the scale and provisions of Part III of the First Schedule. Part III of the Schedule, as it existed on the date of retirement of the petitioner, reads as under:-

> “ PART III
>
> 1. The provisions of this part apply to a Judge who has held any pensionable post under the Union or a State (but is not a member of the Indian Civil Service) and who has not elected to receive the pension payable under Part I.
> 2. The pension payable to such a Judge shall be:-
>
> (a) The pension to which he is entitled under the ordinary Rules of his service if he had not been appointed as a Judge, his service as a Judge being treated as service therein for the purpose of calculating that pension; and
>
> (b) a special additional pension of Rs.1600/- per annum in respect of each completed year of service for pension but in no case such additional pension together with the additional or special pension, if any, to which he is entitled under the ordinary Rules of his service shall exceed Rs.8000/0- per

annum.

Provided that the pension under clause (a) and the additional pension under clause (b) together shall in no case exceed Rs.54000/- per annum in the case of a Chief Justice and Rs.48000/- per annum in the case of any other Judge".

However, it may be noticed that the provisions of Part I and III have been amended subsequently by Act No.7 of 1999. By virtue of the said amending Act, special additional pension was contemplated to be Rs.5200/- per annum in respect of each completed year of service for pension but the maximum pension payable in terms of the proviso to a Judge was fixed at Rs.1,56,000/- per annum. Later, vide Act No. 46 of 2005, special additional pension has been contemplated to be Rs. 7800/- per annum in respect of each completed year of service for pension with maximum limit of Rs.2,34,000/- per annum in terms of the proviso.

As far as ceiling of Rs.8000/- per annum in Para 2 (b) of the Act is concerned, the matter is not res integra. Hon'ble Supreme Court in **M.L. Jain (II) vs. Union of India, AIR 1991 SC 928,** has struck down the said limit of special additional pension. The said principle was reiterated in **N.D.P. Namboodripad (dead) by LRs. vs. Union of India and others, (2007) 4 SCC 502** as well. In fact, subsequent amendments carried out vide Act Nos. 7 of 1999 and 46 of 2005, the maximum limit in Para 2 (b) of the Act has been omitted.

The controversy revolves around the maximum of Rs.48,000/- per annum as pension payable to a former Judge. As per petitioner, his pension, taking into consideration his pensionable service under the State itself, is Rs.48,000/- per annum, but he did not get any benefit of pension for the service rendered in this Court on account of the limit of maximum

pension payable under the proviso.

Learned counsel for the petitioner has relied upon **M.L. Jain and another vs. Union of India, AIR 1985 SC 619,** wherein the Hon'ble Supreme Court has found that in the recent budget proposals, the ceiling on the pension of civil servants is to be lifted. A hope was raised in the case of Judges also, the ceiling be lifted as early as possible. The said observations read as under:-

> "....We find that in the recent budget proposals, the ceiling on the pension of civil servants is to be lifted. We hope the situation will be remedied in the case of Judges also and the ceiling lifted as early as possible. We may suggest that this case may be done straightway by including suitable provisions in the Bill now announced to be pending before Parliament. This will, of course, be quite apart from the other changes for the improvement of the Conditions of Service of Judges in the matter of salaries, allowances etc., which changes also brook no further delay if justice is to be done to the Judges....."

In **M.L. Jain's (II) case (supra),** the ceiling of Rs.8000/- per annum was found to be violative of Article 14 of the Constitution of India. However, the Court found that presence of the proviso brings out the intention that no attempt is sought to be made between Judges recruited from different sources for the matter of ceiling on pension. It was held to the following effect:-

> ".... It is the contention of the petitioner that once a ceiling limit was fixed as contained in the proviso of the Third Part, there was no further justification for the paragraph 2(b) ceiling. We find full force in the submission. The reasons which weighed with this Court on the earlier occasion for enhancing the petitioner's pension fully apply to the present aspect. The ceiling of Rs.8000/-, therefore, is not necessary to be imposed

> and if that is applied, a situation giving rise to the application of Article 14 of the Constitution does arise. In fact, the presence of the proviso clearly brings out the intention that no attempt is sought to be made between Judges recruited from the different sources for the matter of the ceiling on pension. We, therefore, modify the order of this Court fixing petitioner's pension at Rs.46,100 and require his pension to be fixed at Rs.48,000/- per annum by holding that the ceiling in para 2 (b) of Part III of the First Schedule is unsustainable under Article 14 of the Constitution and would not be operative..."

Relying upon the aforesaid judgements and few other judgements pertaining to the principles of interpretation, such as **Mohan Lal Tripathi vs. The District Magistrate, Rae Bareilly and others, JT 1992 (4) SC 363, J. K. Industries Limited etc. etc vs. The Chief Inspector of Factories and Boilers and others etc etc, JT 1996 (9) 27 SC** and **Haryana State Co-operative Land Development Bank Limited vs. Haryana State Cooperative Land Development Bank Employees Union and another, 2004 Service Cases Today 480**, it is sought to be argued that the proviso, in fact, takes away the right which is given in Clauses (a) and (b). Thus, it is argued that there could not be ceiling on the pension payable to a retired Judge.

Before we examine the issue, it may be noticed that in Part I of the First Schedule, there is a ceiling on the maximum of pension payable to a Judge and to a Chief Justice. It is in tune with the ceiling of maximum pension payable to a Chief Justice and Judge in Part II and Part III of the First Schedule. It shows that there is no distinction in respect of maximum pension payable to a Judge irrespective of source of appointment.

Another factor which was referred to by the petitioner is that in

respect of members of All India Service, the amendment has been made on 22.5.1987 in All India Service (Death-cum-Retirement Benefit) Rules, 1958. As per amendment, the ceiling on pension payable is Rs.4500/- per month i.e., Rs.54,000/- per annum. It is, thus, argued that to maintain parity in respect of pension payable to the members of the All India Service, the maximum pension payable to the members of the All India Services should be made applicable as maximum payable to the Judges as well. The relevant part of the Rule in respect of All India Services reads as under:-

> ".. In case a member of the service retires from service in accordance with the provisions of these rules, after completing qualifying service of thirty three years or more, pension shall be admissible to him at the rate of fifty per cent of the average emoluments reckonable for pension: Provided that the pension calculated as above shall be subject to a ceiling of rupees four thousand five hundred per month .."

We have heard learned counsel for the parties at length.

The pension is payable in terms of the provisions of the Act. The Act contemplates ceiling on the pension payable. Whether such ceiling can be said to be arbitrary and unjustified on the basis of pension payable to the members of the All India Services in terms of the Rule amended on 22.5.1987 is required to be examined first.

The Act provides for the pension payable to the Judges appointed from different sources. Rule 2 of the High Court Judges Rules, 1956, framed under the Act, contemplates that the conditions of service of a Judge of a High Court for which no express provision has been made in the Act shall be, and shall from the commencement of the Constitution be deemed to have been, determined by the Rules for the time being applicable to a member of the Indian Administrative Service holding the rank of

Secretary in which the principal seat of the High Court is situated. However, in the case of a Judge of the High Court of Delhi and a Judge of this Court, the conditions of service is required to be determined by the Rules for the time being applicable to the members of the Indian Administrative Service on deputation to the Government of India holding the rank of Joint Secretary to the Government of India stationed at New Delhi.

In terms of the aforesaid Rule, it is apparent that parity with the Rules applicable to a member of the Indian Administrative Service can be made only if there is no express provision in the Act. Since the Act contains express provision of pension payable to a Judge, therefore, pension payable to a member of the All India Services cannot form made basis to return a finding of arbitrariness. It may be desirable or expected not to grant pension and other allowances to the Judges less than the allowances and pension payable to the members of the All India Services, but in the absence of any statutory provision, the proviso of the Act cannot be said to be arbitrary viz-a-viz to the pension payable to the members of the All India Services as violative of any part of the Constitution.

The argument that the proviso, in fact, takes away the right which has been given in the main substantive provision is again not tenable. In **Mohan Lal Tripathi's case (supra)**, it has been held that a proviso or an exception is incapable of controlling the operation of principal clause. In **J.K. Industries Limited's case (supra),** Hon'ble Supreme Court explained the scope of proviso in different situations. The same reads as under: -

> " 33. A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the Court is required to carefully scrutinise and find out the real object of the proviso appended to that provision. It is not a

proper rule of interpretation of a proviso that the enacting part or the main part of the Section be construed first without reference to the proviso and if the same is found to be ambiguous only then recourse may be had to examine the proviso as has been convassed before us. On the other hand, an accepted rule of interpretation is that a Section and the proviso thereto must be construed as a whole each portion throwing light, if need be, on the rest. A proviso is normally used to remove special cases from the general enactment and provide for them specially.

34. A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but for the proviso would be a part of the main provision. A proviso must, therefore, be considered in relation to the principal matter to which it stands as a proviso. A proviso should not be read as if providing something by way of addition to the main provision which is foreign to the main provision itself.

35. Indeed, in some cases, a proviso, may be an exception to the main provision though it cannot be inconsistent with what is expressed in the main provision and if it is so, it would be ultra vires of the main provision and struck down. As a general rule in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear, it is desirable to make an effort to give meaning to the proviso with a view to justify its necessity."

In **Haryana State Co-operative Land Development Bank Limited's case (supra),** it was held that the normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main

enactment and its effect is confined to that case. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule.

There cannot be any dispute with the general rule of interpretation in respect of a proviso. As held in **Haryana State Co-operative Land Development Bank Limited's case (supra),** a proviso is to except something out of the enactment or to qualify something enacted therein. Thus, what is contemplated in Para 2 (b) of the First Schedule can be construed or excepted by way of a proviso i.e., to fix a maximum limit. In terms of the substantive Para 2 (a) and (b), there is no ceiling on the amount payable but a ceiling has been introduced by proviso. Such ceiling is as exception to the main clauses and restricts the benefit which flows from clauses (a) and (b) of Para 2. In **J.K. Industries Limited's case (supra)**, the rule of interpretation was that section and the proviso must be construed as whole each portion throwing light, if need be, on the rest. It was found that a proviso is normally used to remove special cases from the general enactment and qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but for the proviso would be a part of the main provision. That is exactly the proviso of Para 2(a) and (b) contemplates.

In **Kedarnath Jute Manufacturing Co. Ltd., vs The Commercial Tax Officer and others, AIR 1966 SC 12**, Hon'ble Supreme Court held to the following effect:-

> "Section 5(2)(a)(ii) of the Act in effect exempts a specified turnover of a dealer from sales tax. The provision prescribing the exemption shall, therefore, be strictly construed. The

substantive clause gives the exemption and the proviso qualifies the substantive clause. In effect the proviso says that part of the turnover of the selling dealer covered by the terms of sub-cl.(ii) will be exempted provided a declaration in the form prescribed is furnished. To put it in other words, a dealer cannot get the exemption unless he furnishes the declaration in the prescribed form. It is well settled that "the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it..."

In **S. Sundaram Pillai etc vs. V.R. Pattabiraman, AIR 1985 SC 582,** Hon'ble Supreme Court has held that the proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment. Later, it held that while interpreting a proviso, care must be taken that it is used to remove special cases from the general enactment and provide for them separately. It was also held that a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause.

The Court held to the following effect:-

" 35. While interpreting a proviso case must be taken that it is used to remove special cases from the general enactment and provide for them separately.

36. In short, general speaking, a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to

> modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself".

In view of the aforesaid judgements pertaining to the scope of interpretation of proviso, we are of the opinion that the proviso appended to Para (b) of Part III of the First Schedule limits the benefit which has been granted in Para 2 (a) and (b). The said limit or ceiling falls within the scope of proviso. Still further, such ceiling is not only restricted to Part III of the First Schedule but also Part I and II. Since there is common ceiling in respect of appointment of Judges made from different sources, therefore, such ceiling provides uniformity in the maximum amount of pension payable to a Judge irrespective of source of appointment.

Learned counsel for the petitioner has further argued that pension and retiral benefits payable to the petitioner as a Judge of High Court are less than what he was entitled to as a District and Sessions Judge on retirement. Since the pension is payable under the statute and has fixed a particular ceiling, therefore, the proviso of the statute cannot be struck down for the said reason.

In view of the above, we do not find any merit in the present writ petition. The same is dismissed accordingly.

(HEMANT GUPTA)
JUDGE

December 21, 2007
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(MOHINDER PAL)
JUDGE